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U.S. Coast Guard

Artwork:
David
Sones

October 15, 2001

Ms. Carol Bernthal
Superintendent
NOAA/Olympic Coast National Marine Sanctuary
138 W. First Street
Port Angeles, Washington 98362-2600

Dear Ms. Bernthal:

The Olympic Coast National Marine Sanctuary Advisory Council (OCNMS SAC) would like to comment on the August 2001 Draft Report "Fair Market Value Analysis for a Submarine Cable Permit in National Marine Sanctuaries" prepared for NOAA's National Marine Sanctuary Program.

The OCNMS SAC consists of nineteen (19) members from non-governmental interests, governmental organizations and Indian Tribes. The membership on the SAC is as follows: Non-governmental; Citizen-at-Large, Education, Research, Conservation/Environmental, Chamber of Commerce/Tourism/Recreation, Marine Business/Ports/Industry, and Commercial Fishing. The Governmental positions are: U.S. Department of Interior-Olympic National Park, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Washington State Department of Ecology, Washington State Department of

Natural Resources, Washington State Department of Fish And Wildlife and Local Government. The Hoh, Makah, and Quileute Tribes and the Quinault Indian Nation are also members of the SAC.

Olympic Coast National Marine Sanctuary

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OCNMS SAC members considered the text of this letter at the October 15, 2001 meeting. The meeting was conducted with a quorum of voting members present. Members present voted unanimously in support of the letter and to forward it to the OCNMS Superintendent.*

The OCNMS SAC is committed to active support of the National Marine Sanctuary System in their mission to preserve and protect the unique resources found within the established national marine sanctuaries. The OCNMS SAC is supportive of education, resource protection and research activities and commercial endeavors that are compatible with the primary objectives as stated above. The SAC also acknowledges that policy actions must consider the impact on and uphold the treaty-protected rights of Indian Tribes. It is with these precepts in mind that the majority of the SAC membership offer comments on establishing a fair market value fee.

In commenting on the Report, the OCNMS SAC makes the following points which are elaborated upon in the text that follows:

- Establishing a fair market value fee is premature given that the national policy guidance for fiber optic cables has not been completed.
 - Existing and future approved cable projects must meet environmental standards and should be charged a fair market value fee at a rate that reflects the unique value of the sanctuaries.
 - The preferred evaluation method should be based on a concept of a non-willing seller.
 - The OCNMS SAC's preferred method is based on the comparable transaction method, with additional recommendations.
 - Fiber optic cables may not be appropriate activities to be considered under a Special Use Permit.
 - The impacts of fiber optic cables are understated in the Draft report.
 - The general policy of the National Marine Sanctuary Program should be to discourage cables within national marine sanctuaries.
 - The financial future for cable companies may be overstated, potentially leading to company defaults or inability to meet permitting and financial obligations associated with approved projects.
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- Establishing a fair market value fee is premature given that the national policy guidance for fiber optic cables has not been completed

The establishment of a fair market value for the installation of fiber optic cables in national marine sanctuaries is troublesome to the members of the SAC given that a national policy on submarine cables has not yet been completed, and there is a clear connection between the two policy actions. Establishing a fair market value for the laying of fiber optic cables is tacit approval and signals that it is NOAA's general policy to consider additional projects.

* Two members recused themselves citing potential conflict of interest.

Economic development and private benefits derived from using Sanctuary resources is not mentioned as a primary mission or a goal of the National Marine Sanctuary Act (NMSA) nor the establishing regulations of most sanctuaries. It is our belief that there is sufficient evidence of immediate and ongoing injury to sanctuary resource to seriously oppose the routing of future fiber optic cables through national marine sanctuaries.

- Existing and future approved cable projects must meet environmental standards and should be charged a fair market value fee at a rate that reflects the unique value of the sanctuaries

Should events evolve that dictate the installation of fiber optic cables in the sanctuaries, permitting processes and standards must be rigorously followed and fair market fees assessed. The two approved fiber optic cable projects should be assessed a fair market value fee. Any fee structure developed by NOAA should incorporate the policy directive of discouraging sanctuary routes, reflecting the philosophy that NOAA is not marketing Sanctuary resources, and not conferring private benefits at the expense of public resources without appropriate compensation.

- The preferred evaluation method should be based on a concept of a non-willing seller.

Fair market value implies that the owner of the resource is interested in marketing the resource and making a “fair” profit from the sale. Since the policy of the NMSP should be to prohibit or discourage cable installations, several of the accepted methods of establishing value can be eliminated. Methods such as land-based appraisal, willing buyer and seller, and income-based all have the underlying assumption that there is a desire to engage in a transaction on the part of the seller and buyer. NOAA should not be viewed as a willing seller.

The report devotes much thought and energy to finding that pricing combination that provides a price that maximizes revenues at a level that is economical enough to allow the customer to buy. Land-based appraisal approaches, such as the before and after rule, across-the-fence (ATF) and highest and best use, fail to value the purpose of a sanctuary and pristine environment that sanctuary is intended to preserve. These approaches focus on property values and do not have a component that values unique amenities, such as the resources of a marine sanctuary. The report recognizes that land-based valuation is no longer used in the telecommunications market.

The income-based method is equally weak in establishing a fair market value for laying fiber optic cable in sanctuaries. This method is used to value property that is offered for rent or lease on an ongoing basis, and the effort is to find a price that is mutually acceptable to the buyer and seller. Once again the sanctuary should not be perceived as marketing the resource, and therefore is not trying to develop a price that will attract a buyer. In conclusion, we recommend against using these methods.

- The OCNMS SAC's preferred method is based on the comparable transaction method, with additional recommendations.

The OCNMS SAC's recommendation is to use the comparable sales method to derive a fair market value for permitted fiber optic cables. We recommend the following additional considerations:

A fee, derived from an analysis of comparable transactions, should be based only on the **highest purchase price** that has been paid for cable routes through an environmentally sensitive marine area, rather than an averaging of past transaction values. This is justified based on the national significance, relatively rarity and unique management responsibilities of national marine sanctuaries. The total pricing structure should be high enough that cable companies will choose an out-of-sanctuary route, if there is one available.

According to the study review conducted by Richard Schmalensee, the \$120,000/mile figure referenced in the report is based on transactions that market observers have noted are far below fair market values, because of numerous below-value transactions with uninformed sellers. We do not concur with discounting the California Lands Commission value of \$280,000 because "it would raise the average significantly". In the case of sanctuary environment, urban or rural distinction does not impact the value either way. The sanctuary is environmentally unique and sensitive area regardless of the location, and has been designated a sanctuary for that reason, and should be highly valued. We recommend a fee of \$280,000 per mile. In addition, a high percentage, such as 50% of the highest value, should be added as compensation for damage to the pristine environments.

In addition to a per-mile fee, a Special Use Permit (SUP) should cover costs incurred or expected to be incurred as a direct result of the conduct of the activity. This should include contingencies to cover unexpected events, such as the need to rebury the cable, repair damage to the Sanctuary, collect for default of the contract, and litigate for contract performance or collection work. The permittee should be required to post a bond for the duration of the contract that will cover any injury or disruption to the sanctuary. The SUP should also include costs incurred or expected to be incurred for issuing the permit. OMB Circular A-25 should be used as a guide in recovering full costs to the Sanctuary, including administrative costs, physical overhead, consulting and indirect costs.

- Fiber optic cables may not be appropriate activities to be considered under a Special Use Permit.

Under Section 310 of the National Marine Sanctuary Act, the Secretary may issue a Special Use Permit to authorize the conduct of specific activities in a national marine sanctuary, if such authorization is necessary to establish conditions of access to and use of a sanctuary resource, or to promote public use and understanding of a sanctuary resource. Issuing a SUP for a fiber optic cable may be viewed as establishing conditions

of access, but for a private benefit, and does not promote public use or understanding of sanctuary resources. The report implies that the NMSA allows a SUP to be used for “the presence of a fiber-optic cable on the floor of a sanctuary” when; in fact, it provides only guidelines for issuing SUPs and does not name any specific activity.

There are no standards listed for how many of or how strongly the permit provisions must be met before the SUP can be issued. It appears that it is the sole judgment of the Secretary. On face value, installation and operation of a fiber optic cable does not meet several standards of the SUP, in that the activity is not compatible with sanctuary regulations, and evidence has shown that the conduct of the activity may in fact result in harm or loss to sanctuary resources. In addition, the 5-year time approval for renewing permitted activities is difficult, since it is unlikely that the activity would be denied after considerable resources have been committed to cable installation, and it would be damaging to the sanctuary if the cable had to be removed after 5 years. When the permit is granted, it is in fact for the full 25-year life of the cable.

- The impacts of fiber optic cables are understated in the Draft report

The report would lead a reader to believe that the impact to the seabed is minimal and that steps can be taken to minimize the impact of the installation. Cable installation activities generally disturb an area 3 meters wide, and unpredictable activities such as maintenance or repair have the potential to provide episodic additional disturbances. Recent experiences with projects, such as the Pacific Crossing PC-1 in the Olympic Coast National Marine Sanctuary, lead us to believe that the impacts are greater than previously stated. Site inspections showed that 22% of one cable and 14% of the other of the PC-1 cable within the OCNMS is exposed, contrary to permit requirements. In addition, other permit obligations have not been met, leading to an excessive administrative burden for sanctuary staff. Fishing gear has been observed entangled on the exposed section of one of the cables, as have modifications to seafloor sediment conditions. Remediation actions under consideration, including potential reburial of exposed sections of cable, will result in additional disruptions of the seafloor that were not anticipated in the original permit. The California Lands Commission reports that no permitted project in California has achieved 100% cable burial. These factors should be discussed and adequately considered in the report.

- The general policy of the National Marine Sanctuary Program should be to discourage cables within national marine sanctuaries

It is the OCNMS SAC’s contention that the installation of fiber optic cables is generally inconsistent with sanctuary regulations prohibiting activities that alter the seabed or construct structures on the seabed, and should be strongly resisted for the reasons described above.

- The financial future for cable companies may be overstated, potentially leading to company defaults or inability to meet permitting and financial obligations associated with approved projects

The report elaborates on a very optimistic future for the fiber optic companies, contrary to other available information. A New York Times article dated June 18, 2001 (attached), reported that there is a great deal of excess capacity within the telecommunications industry, and that many of the smaller companies are going out of business and the larger ones are having financial trouble. The prediction for the future is that it will be sometime before the cable industry will rebound to a health business climate. The implication of an uncertain financial future is that cable companies may not be able to meet permitting and financial obligations subsequent to the initial permit approval, and impacts associated with cable installation.

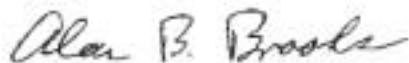
Finally, fees should be periodically re-evaluated based on changing market conditions, and the fair market value fee updated as appropriate. In addition, at the five year reconsideration of existing permits, the fee balance should be reconsidered and adjusted to reflect updated information.

In addition to the considerations of the sanctuaries, any Indian Nation or Tribe who's Usual and Accustom areas are affected by the installation of a Fiber Optic Cable, should be contacted individually to determine the impact on their enterprises.

In conclusion, the installation of fiber optic cables must not be permitted and must be strongly discouraged any routes in national marine sanctuaries for this purpose. Should events occur that force the use of a sanctuary as a route, then a fair market value fee must be assessed at the highest per-mile value based on comparable transactions, and specifically must add to the per-mile rate, a public benefit amenity value reflective of the unique character of these areas, plus all the expenses enumerated in OMB Circular A-25. In recognition of the changing market, the fair market value fee structure should be evaluated at least every 5 years to allow adjustments for inflation and advancement of market prices. We also recommend that at least 50% of any required fees be dedicated to the particular site affected by the activity, with the balance being used to benefit the National Marine Sanctuary Program.

Thank you for the opportunity to comment on this issue and we respectfully request that you formally respond to our comments.

Sincerely,



Al Brooks
Vice-Chair, Olympic Coast National Marine Sanctuary Advisory Council